

THE CAPITOL LETTER

*A Publication of the State of West Virginia
Public Defender Services
Criminal Law Research Center*

BABY STEPS: SETTING UP AN ONLINE ACCOUNT

Volume 1, Issue 1

November/ December 2013



In the previous newsletter, the announcement was made that it would eventually become mandatory for court appointed legal counsel to prepare their vouchers using the West Virginia Public Defender Services on-line voucher system. Some negative feedback was received, primarily chiding this office for unwarrantably foisting technology upon solo practitioners. However, the subsequent announcement by the Supreme Court of Appeals of West Virginia that electronic filing is to become mandatory seemingly acquits this agency of such charges.

The agency is conscious of the fact that, for many practitioners, the use of the on-line voucher system will be outside the zone of comfort. Accordingly, baby steps are going to be taken.

The first step is to establish an "online account." Every attorney who is currently accepting appointments and who is submitting vouchers for payment will be expected to have an account established by the date of November 30, 2013. At that point, the second step will be described, which will be to create access to the on-line voucher system for the attorney and perhaps for others in the attorney's office, who are referred to as data entry users.

The first step will require that you have an email address. If you do not have access to internet, you should contact this office. However, compliance with the mandatory on-line filing requirements of the Supreme Court of Appeals will require such access, so you should obtain a connection to the internet if you do not yet have one.

To take the first step, you must go to: <http://apps.wv.gov/accounts>. When you arrive at that page, you will see the section with the heading "sign up." You should follow the directions. When you are done, you will

have your "WV.gov Username." You will then receive an automatically generated email transmission to the email address that you provided. You will be asked to click on a link in the email in order to activate the account.

You have now completed the first step. If you are emboldened by success, you can go to the website for West Virginia Public Defender Services and click on the link to the "Online Voucher System" and proceed to the remaining steps. Otherwise, you can await the next newsletter and the next set of instructions. If you choose to do the latter, you should make certain that you record your "WV.gov Username" and your associated password, so that you will be ready when the time comes.

If you have not established the account by the date of November 30, 2013, your vouchers will be the last vouchers to be processed in the course of the agency's business. Restated, your vouchers will be processed, but only after the

contemporaneously received on-line vouchers or vouchers of attorneys who have established accounts have been processed.

If you have any questions regarding Step 1, you are encouraged to contact the agency and ask for Sheila Coughlin.

If you have any questions regarding the policy underlying this effort, you are encouraged to contact the agency and ask to speak to Dana F. Eddy, the Executive Director.

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GOINS, GOINS, GONE:

In the case of *State v. Goins*, __ S.E.2d __ (2013), 2013 WL 5047513, the allegation was that the defendant, while drinking, caused his wife to flee from the home with the children. At a neighbor's house, the wife called her brother. Her brother loaded up a van with his wife and three children and drove to the neighbor's house. His sister was not at the neighbor's house. The brother drove to the defendant's residence. After a stare-down of "several minutes" between the brother and defendant, the defendant aimed a pistol in the direction of the brother's vehicle and fired several shots, all of which impacted near the vehicle. Charges and an arrest ensued.

The defendant was charged with five counts of wanton endangerment; that is, one count for each of the brother, the brother's wife, and the three children, all of whom were in the van in the vicinity of which the defendant had shot the pistol. A jury convicted the defendant of five counts of the lesser included offense of brandishing. The defendant was sentenced to five consecutive terms of one year.

The compelling issue in the matter was whether the principle of double jeopardy precluded multiple punishments for a single offense. See *State v. Gill*, 416 S.E.2d 253 (W. Va. 1992) (Double Jeopardy Clause of Fifth Amendment to United States Constitution) and *Conner v. Griffith*, 238 S.E.2d 529 (W.Va. 1977) (Double Jeopardy Clause of Article III, Section 5 of the West Virginia Constitution). This issue is to be distinguished from the

issue of whether the same conduct can give rise to separate statutory offenses. See *State v. Gill*, *supra*, and *Blockburger v. United States*, 284 U.S. 299 (1932).

The analysis in this matter was articulated as follows: "whether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns upon the legislatively-intended unit of prosecution." The Court noted, therefore, "we must look to the applicable penal statute to determine the legislatively-intended unit of prosecution for brandishing."

The Court resolved the issue favorably to the defendant based upon principles of statutory construction. The brandishing statute focused on the prevention of a "breach of peace" by reason of the brandishing of a firearm and did not focus on a "victim." If the statute had focused on a victim, then five offenses could have been asserted, but because the "unit of prosecution" was the breach of peace, this denoted a focus "without regard to any specific number of persons affected," especially when applying the "rule of lenity." See *State v. Sears*, 468 S.E.2d 324, 334 (W. Va. 1996) ("[W]hen the Legislature fails to indicate the allowable unit of prosecution and sentence with clarity, doubt as to legislative intent should be resolved in favor of lenity for the accused.").

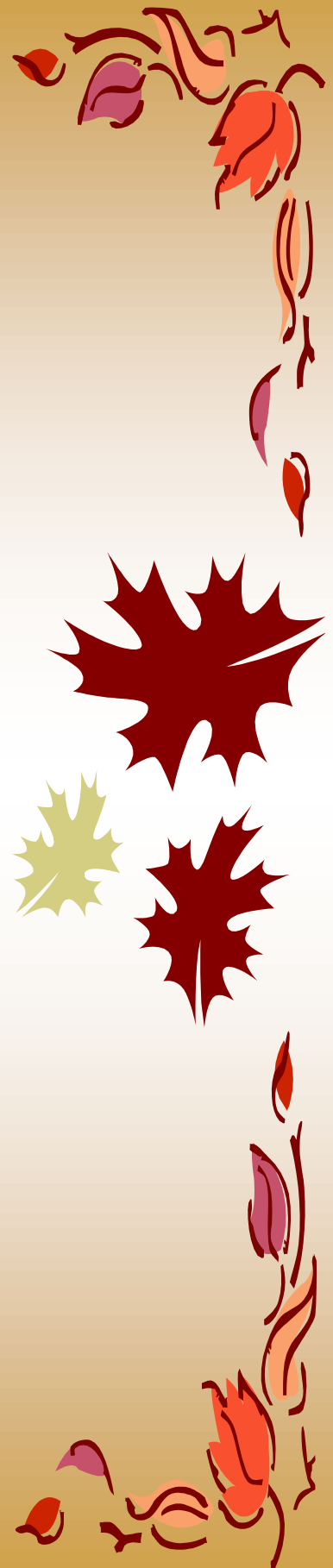
The Court then found, "a single incident of brandishing may not be punished as multiple offenses merely because there are two or more victims present or affected thereby." But, again, if the statute had referred to a "victim" or in some other manner had focused on the effect upon a person, the result would have been otherwise.

In a concurrence, Justice Loughery believed that each shot could have constituted a separate "breach of the peace" and, therefore, multiple violations could have occurred. However, Justice Loughery did not believe the evidence was sufficient on the point of what the defendant's intent was with respect to each separate shot and, therefore, concurred that the conviction on four counts of brandishing should be set aside.

A CAVALIER ARREST

In *State v. Horn*, __ S.E.2d __ (W. Va. 2013), 2013 WL 5433540, the Court considered the issue of whether evidence should be suppressed because the West Virginia state police had detained an individual who, at the moment, was standing in the State of Virginia. The Virginia police had arrived at a murder scene only to determine that the scene was in West Virginia. The West Virginia state police went to the victim's neighbor's house and found a suspect who had blood on his face and boots. The suspect was trying to wipe away the blood from his ear and to scuff his boots. The West Virginia state police then detained the suspect only to be informed that the neighbor's house was in the Commonwealth of Virginia. The Virginia state police were recalled. The defendant was arrested and eventually returned to West Virginia upon his waiver of extradition.

The defendant moved to suppress the blood stained evidence on the basis of an illegal arrest. The Court recited its various opinions that, in this situation, the West Virginia state police had the same right to arrest the defendant as did a private citizen. After discussion, the Court determined that



A CAVALIER ARREST

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this right was to be measured by the law of Virginia. And, in Virginia, a police officer “acting beyond his territorial jurisdiction ... nonetheless retained power as a private citizen to make an arrest when ... the felony had actually been committed and he had reasonable grounds for believing the person arrested had committed the crime.” *Tharp v. Commonwealth*, 270 S.E.2d 752 (Va. 1980). Accordingly, the motion to suppress was properly denied by the lower court.

The interesting aspect of the decision is that the Court seemingly declares the Virginia principle to be a matter of “common law”. The Court seems to imply that because it derives from common law, the principle would be applicable to events occurring in the State of West Virginia. Until this decision, the rule in West Virginia regarding the rights of citizens to make an arrest applied to only misdemeanors committed in the presence of the citizen and giving rise to a breach of the peace. Now, the rule may be that West Virginia citizens can make arrests if a felony has been committed and the citizen reasonably believes the person committed the crime.

WHAT'S YOUR OBJECTION?

The *per curiam* opinion in *State v. Maggard*, __ S.E.2d __ (W. Va. 2013), 2013 WL 5583475, is particularly instructive on the subjective manner in which appellate decisions may be decided. The defendant had been convicted of a sexual assault count based on digital penetration, but had been acquitted of a second degree sexu-

al assault count based on penile penetration. The issue was the alleged victim's testimony about why she was guarded in her encounter with the defendant. She testified that “I heard how he is.” An objection was made, which was overruled, and the alleged victim then stated she knew “he just wants to get one thing from girls.”

The objection was made as follows: “‘Heard how he is’ is completely outside the scope of what is going on here.” The objection was not expressly made on the grounds that the elicited testimony constituted evidence of character or a trait to prove that, on that night, the defendant acted in conformity with this character or trait, which is precluded by Rule 404(a) of the West Virginia Rules of Evidence. Instead, the objection was more phrased as a relevance objection which would be governed by Rule 401 of the West Virginia Rules of Evidence.

In the end, the Court determined that this was highly prejudicial testimony in that it portrayed the defendant as a sexual predator and the Court found that the “very nature of ... [the] statement pertaining to ... [the defendant's] character makes the specific ground for defense counsel's objection **sufficiently apparent** from the context of the discussion had before the trial court.” [emphasis added]. See Rule 103 of the West Virginia Rules of Evidence. Intriguingly, the Court noted that, “our conclusion is also supported by the fact that the trial court never sought clarification from defense counsel asking what grounds the objection covered.” Restated, the trial court was perceived to have an obligation to make clear

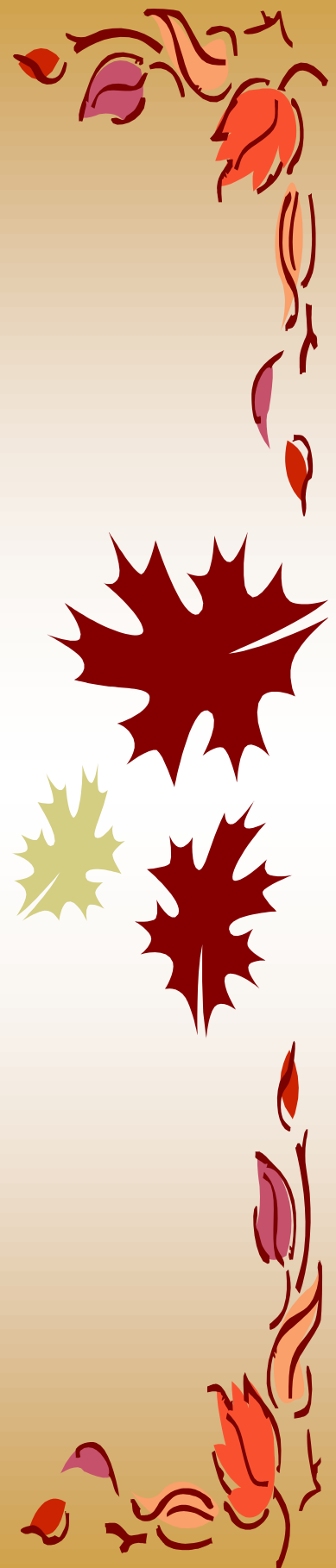
the grounds for an objection.

The conviction was overturned. The dissent by Justice Loughery was vigorous, challenging the majority opinion on whether the evidence was actually character evidence and whether the error, if any, was harmless.

The experienced counsel knows that the Court has on many occasions found that objections on critical issues have been waived. This decision suggests that if you find it objectionable, you should object even if you are not certain what the correct rule of evidence is. Moreover, the trial court is seemingly instructed to make clear what the grounds for an objection are, if not clearly articulated. On appeal, you may be forgiven for this uncertainty on the grounds of the objection if the evidence is sufficiently prejudicial. But again, this seems to be a purely subjective determination.

DON'T YOU DARE INTERRUPT ME.

In *State v. Garner*, __ S.E.2d __ (W. Va. October 17, 2013), the convictions of the defendant on charges of voluntary manslaughter, wanton endangerment, and carrying a concealed weapon without a permit were overturned. The underlying facts arose out of gunplay outside a Huntington night club that resulted in one death and several wounded participants. In a *per curiam* decision, the Court found a violation of the Sixth Amendment's right to confrontation when the trial court interrupted the cross-examination of a critical witness by trial counsel. The trial court wanted the defense counsel to depose and essentially woodshed the witness outside the jury so the



DON'T YOU DARE INTERRUPT ME

(CONTINUED FROM PAGE 3)

defense counsel could “sharpen it up.” The defense counsel’s plea that this “is the way I cross-examine people [and] I ain’t going to be able to change ... [after] thirty years” did not influence the trial court. The Supreme Court found this maneuver by the trial court to be “bizarre.” The Court found that, “by requiring defense counsel to prepare ... [the witness] in advance for the continuation of cross-examination, the circuit court eliminated the purpose of cross-examination and rendered it utterly ineffective.” The deprivation of this constitutional right was reversible error “unless it could be shown that the error was harmless beyond a reasonable doubt.” Accordingly, the conviction was reversed and the case was remanded.

LET US COUNT THE WAYS.

In *State v. Bowling*, __ S.E.2d __, (W. Va. 2013), 2013 WL 5583473, the dissent of Justice Margaret Workman actually raises the critical issue, which is, what vigor remains in the cumulative error doctrine after the majority’s decision in the case? Specifically, the majority acknowledges that the trial court improperly admitted: (i) a state trooper’s hearsay evidence regarding a past incident of violence; (ii) the testimonial hearsay of the victim’s friend regarding the victim’s statement, “if I’m shot in my sleep, promise me that you’ll tell the police that it was no accident”; (iii) the testimonial hearsay of another friend of the victim that the victim had expressed fears that the defendant would kill her; (iv) the admission of documents, without foundation, that contained hearsay regarding a violent incident between victim and

defendant; (v) bad acts evidence contained in the aforementioned witnesses’ testimony; (vi) 911 calls made by other defendants alleged to have committed murder; and (vii) a legal conclusion of a state trooper regarding the defendant’s actual malice. Notwithstanding the number and nature of the errors, the Court’s majority concluded, “if this evidence had been completely excluded from the trial, the State would have still provided enough evidence to support Mr. Bowling’s conviction.” In her dissent, Justice Workman noted: “Under our long-established doctrine of cumulative error, I cannot agree that the combination of five errors, all egregious, all prejudicial, and three in clear violation of the Constitution, were harmless.” Justice Menis Ketchum also dissented, so, notably, this was a *per curiam* decision of three justices.

VOUCHER UPDATE

For the period of July 1, 2013, through September 30, 2013, West Virginia Public Defender Services has processed 7,707 vouchers for payment in a total amount of \$5,455,816.18.



MOST HIGHLY COMPENSATED COUNSEL

For the period of July 1, 2013 - October 21, 2013

Sal Sellaro Culpepper Legal Group PLLC	\$ 78,467.95
Kurelac law Office PLLC	\$ 77,671.00
William M. Lester	\$ 76,244.08

MOST HIGHLY COMPENSATED SERVICE PROVIDERS

for the period of July 1, 2013 - October 21, 2013

Forensic Psychology Center, Inc.	\$ 51,917.79
Tri S Investigations, Inc.	\$ 41,853.33
Forensic Psychiatry, PLLC	\$ 12,700.00



TAKE A
LOOK !

"Our newsletter
has a brand new
name and a new
and improved
design!"

MARK YOUR CALENDARS!

West Virginia Public Defender Services and the Cabell County Public Defender Office would like to invite you to attend an upcoming CLE event.

*WV Public Defender Services and the
Cabell County Public Defender Office Presents:*

**Winning the Eyewitness Identification Case:
How to Cross-Examine the Eyewitness, and
New Techniques for Suppressing Photos and Line-Ups**

Presented by Ira Mickenberg

Friday, November 8, 2013
9:30 to 12:30 p.m.
Summit Conference Center
Charleston, WV

Wednesday, December 4, 2013
9:30 to 12:30 p.m.
Holiday Inn Martinsburg
Martinsburg, WV

See our website for registration and contact information at www.pds.wv.gov.
Click on the Research Center tab, then CLE schedule.

NOTABLE QUOTES

"[T]he majority opinion somehow concludes that the parade of inadmissible evidence was harmless, and that the defendant got a fair trial. It all reminds me of the trial in *Alice in Wonderland*, with the Queen demanding that the accused be 'Sentence[d] first – verdict afterwards.' By the majority's measure, I guess the Sanhedrin gave Jesus Christ a fair trial."

Justice Menis Ketchum, Supreme Court of Appeals of West Virginia, dissenting opinion in *State v. Bowling*, __ S.E.2d __, (W. Va. 2013), 2013 WL 5583473. In a footnote, the Justice notes that "I suggest, though, that if this prosecutor had been around 2000 years ago, she might have had difficulty finding prior bad acts to admit before the Sanhedrin under Rule 404(b)."

Honorable Earl Ray Tomblin - Governor

Ross Taylor - Secretary of Administration

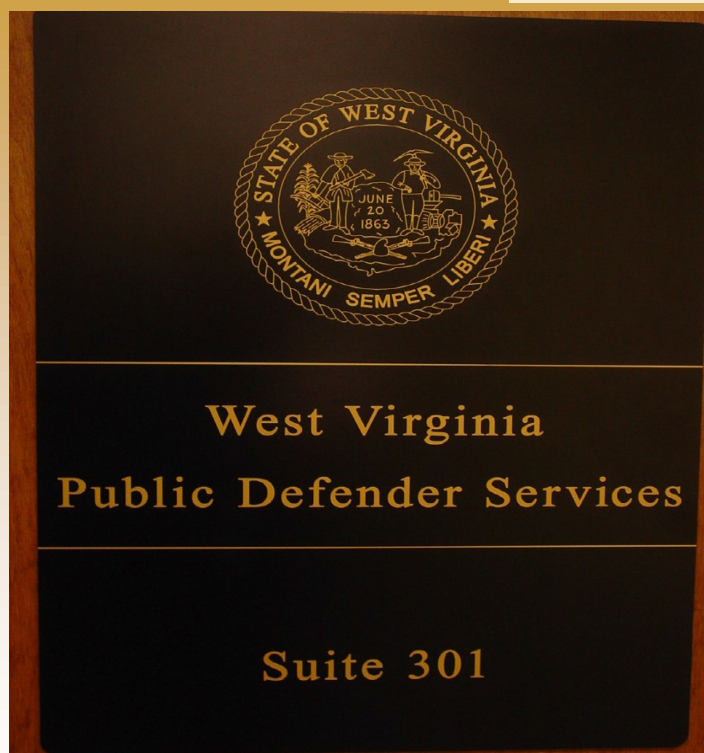
Dana F. Eddy - Executive Director, Public Defender
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Pamela Clark - Criminal Law Research Center
Coordinator/ Newsletter Design

**State of West Virginia
Public Defender Services**

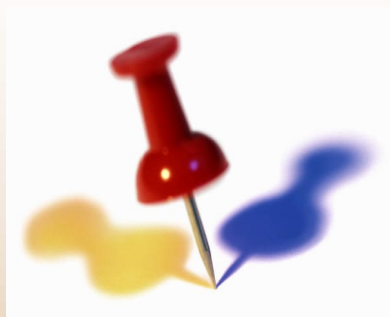
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POINTS OF INTEREST.....



Did you know that the State of West Virginia has adopted the "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings."

The act is codified beginning at Section 1 of Article 6A of Chapter 62 of the West Virginia Code, W. Va. Code §§62-6A-1, *et seq.* The various sections are entitled: Section 2 – "Summoning witness in this state to testify in another state,"; Section 3 – "Summoning witness in another state to testify in this State"; and Section 4 – "Exemption from arrest or service of process." The statute was apparently enacted in 1935 and amended in 1937.

If you have used this statute, you are encouraged to submit a brief discussion of your experience.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Griffin v. Illinois, 351 U.S. 12 (1956)